

A GRANASIA CORPORATION BHD & ORS

v.

CHOONG WYE LIN & ORS AND ANOTHER CASE

B HIGH COURT MALAYA, KUALA LUMPUR

KANG HWEE GEE J

[ORIGINATING SUMMONS NOS: D8-24-339-2007 &

D8-24-340-2007]

30 APRIL 2008

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COMPANY LAW: *Meetings - Calling of meetings - Irregularities in convening of extraordinary general meetings - Notice of EGM served two days short - Section 145(2) Companies Act 1965 - Notices not served on certain directors - Notices not advertised as required by Articles of Association - Meetings and decision made thereunder void*

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COMPANY LAW: *Meetings - Calling of meetings - Whether requisition of EGM by only one member contravenes s. 144(1) Companies Act 1965 - Single member perfectly competent to requisition EGM*

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CIVIL PROCEDURE: *Originating summons - Procedure by - Failure to state grounds for prayers sought - Standard format of originating summons in Form 6 does not require plaintiffs to state therein grounds for prayers sought - Originating summons accompanied by plaintiffs' supporting affidavit - Defendants not prejudiced - Rules of the High Court 1980, O. 1A, O. 7*

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Vide suit D8-24-339-2007, five directors of Granasia Corporation Berhad (Granasia) applied to declare the EGM convened by the company on 20 July 2007 at the requisition of the 2nd defendant

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who was a shareholder of the company null and void. The EGM was convened for the purpose of appointing three new directors of the defendants' choice. *Vide* suit D8-24-340-2007, the same directors applied to declare the EGM convened by the company on 27 July 2007 at the requisition of the 2nd defendant null and

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void. The EGM was convened for the purpose of removing the 2nd plaintiff as the managing director. Counsel for the plaintiffs, *inter alia*, claimed that (i) there was non-compliance with s. 145(2) of the Companies Act 1965 (the Act) which required not less than 14 days notice; (ii) the notice of the EGM had not been

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given to the 4th, 5th and 6th plaintiffs and the auditors as their names were not stated in the notice; and (iii) the requisition of both the EGM being requisition by only one member *ie*, the 2nd

defendant contravened s. 144(1) of the Act. The defendants on the other hand contended that the originating summonses were defective as in the body of both the summons the plaintiffs did not state the grounds on which the prayers were required. The defendants claimed that the plaintiffs had resolved not to partake in the EGM after having received the notice and by this conduct must be deemed to have waived the requirement of s. 145 requiring 14 clear days notice. In respect of the 2nd requisition to remove a director, the defendants agreed that special notice was required under s. 153 of the Act but attempted to invoke the saving provision under s. 153.

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Held (allowing the plaintiffs' applications with costs):

- (1) There were irregularities in the process by which both the EGM were convened. The notice of both the EGM were served two days short of the required 14 days pursuant to s. 145(2) taking into consideration the need to add two days to allow service by post as per art. 159. The notices of both the EGM were not served on the 4th, 5th and 6th plaintiffs and were not advertised as required by the articles. (para 6)
- (2) The defendants' submission alluding to the requirements under s. 153 of the Act was untenable. The plaintiffs' complaint was with regards to the non-compliance of the provision of s. 145 on the requisition of meetings by members and not the giving of notice by the company in respect of resolutions to the members under s. 153. (para 9)
- (3) Form 6 (originating summons requiring appearance) does not specifically require the plaintiffs to state therein the grounds for the prayers sought. The absence of the ground or lack of it did not prejudice the defendants in any case as the originating summons was accompanied by the supporting affidavit of the plaintiffs. (para 10)
- (4) The 2nd defendant was perfectly competent to requisition the EGM but it had failed to comply with the requirement of s. 145 of the Act and the Articles of Association of the company with respect to the service of the notice, the effect of which rendered the meetings and the decision made thereunder void. (para 11)

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A Case(s) referred to:

Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Bhd & Ors [1987] 1 LNS 141 (*refd*)

First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor [1982] 1 LNS 108 (*refd*)

B HLB Nominees (Tempatan) Sdn Bhd v. SJA Bhd & Anor and Another Appeal [2005] 1 CLJ 23 CA (*refd*)

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 HC (*refd*)

Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram [1998] 1 CLJ 1035 CA (*refd*)

C South Norseman Gold Mines No Liability v. MacDonald [1937] SASL 53 (*refd*)

Legislation referred to:

Companies Act 1965, ss. 144(1), 145(2), 148, 153, 355

Rules of the High Court 1980, O. 1A, O. 7 r. 3(1)

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Companies Act 1934 [Aust], s. 133

For the 1st plaintiff - Royhai'zam Basri; M/s Tan Kim Soon & Co

For the 2nd, 3rd, 4th, 5th & 6th plaintiffs - JT Chong (BY Goh with him);

M/s BK Goh & Goh

E For the defendants - Isa Aziz Ibrahim (Rachel Suppiah with him); M/s AI Nathan & Isa Aziz Ibrahim

Reported by Amutha Suppayah

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JUDGMENT

Kang Hwee Gee J:

G [1] D8-24-339-2007 is an application by five directors of the company Granasia Corporation Berhad to declare the EGM convened by the company on 20 July 2007 at the requisition of the 2nd defendant who was a shareholder of the company null and void. The EGM was convened for the purpose of appointing three new directors of the defendants' choice.

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[2] D8-24-340-2007 is an application by the same directors of the company Granasia Corporation Berhad to declare the EGM convened by the company on 27 July 2007 at the requisition of the 2nd defendant null and void. The EGM was convened for the purpose of removing the 2nd plaintiff as the managing director.

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[3] The Grounds (By Counsel For The Plaintiffs)**A**

1. There was non-compliance with s. 145(2) of the Companies Act 1965 which requires not less than 14 days notice and the non-compliance with art. 59 read together with art. 159 of the company's Articles of Association which provides as follows:

B**Article 59:**

The notices convening meetings shall specify the place, the day and the hour of the meeting and shall be given to all Members at least fourteen (14) days before the meeting or at least twenty-one (21) days before the meeting where any special resolution is to be proposed or where it is an annual general meeting. Any notice of a meeting called to consider special business shall be accompanied by a statement regarding the effect of any proposed resolution in respect of such special business. At least fourteen (14) days notice or twenty one (21) days notice in the case where any special resolution is proposed or where it is the annual general meeting, of every such meeting shall be given by advertisement in the daily press and in writing to the Exchange upon which the Company is listed.

C**D****E****Article 159:**

Any notice or other document if served by post, shall be deemed to be served two (2) days following that on which a properly stamped letter containing the same is posted. In proving service by post it shall be sufficient to prove that the letter containing the notice or document was properly addressed and stamped and put into a Government post office letter box.

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- (i) It is clear from the notice of both the EGM that they were both given respectively on 5 July 2007 and 12 July 2007 whereas the 1st EGM was held on 20 July 2007 and the 2nd on 27 July 2007.

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- (ii) Both the notices of the EGM were also not advertised in the daily press as required under art. 59.

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2. The defendants also failed to observe art. 93 read together with art. 161(1)(a) & (d).

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A Article 93 states as follows:

... All Directors shall be entitled to receive notice of and to attend all general meetings of the Company including the EGM.

B Article 161(1)(a) states that “notice of every general meeting shall be given to every Director with a registered address in Malaysia or an address for service of notices in Malaysia”.

C Article 161(1)(d) states that “notice of every general meeting shall be given to the auditors for the time being of the Company”.

D It is clear from the notice of the EGM itself that the notice had not been given to the 4th, 5th and 6th plaintiffs and the auditors as their names were not stated in the notice as the others.

See *HLB Nominees (Tempatan) Sdn Bhd v. SJA Bhd & Anor and Another Appeal* [2005] 1 CLJ 23 per Mokhtar Sidin JCA at 56:

E In the present appeal, the purpose of the meeting to be held is to remove some of the existing directors including the 2nd plaintiff and in their place to elect the directors of the defendant’s choice. To do that, a proper and valid notice of such a meeting should be issued because that

F meeting would affect the right of those directors to be removed who had been duly elected at a proper and valid AGM of the company. For that, the process and procedure for calling such a meeting should be adhered to strictly as stated in *Mansfield v. N.S.W. Leagues’ Club Bowling Club Ltd*, the Australian case cited in the above judgment, where

G it was held that a general meeting to elect the board of directors was held to be invalid for want of proper notice. In my view, any defect in the process or procedure in calling the meeting and at the meeting is not curable under s. 355 of the Act.

H See also *First Nominee (Pte) Ltd v. New Kok Ann Realty Sdn Bhd & Anor* [1982] 1 LNS 108 per Yusoff Mohamed J:

I Upon evidence adduced by affidavits by the respondents, it transpired and it was conceded by the applicant that the notice of the meeting had been sent out but returned undelivered to the applicant. It was also conceded by the

respondents that the notice was sent 11 days before the meeting was held and in that event the notice was 3 days short of the length of service required by the Memorandum and Articles of Association of the Company which specified 14 days.

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There is no precedent on the application of section 355 of the Companies Act but on similar legislation in Australian Companies Act, 1961, the relevant section 366 is in *pari materia* with our section 355. The court there strictly construed the provision particularly where the irregularity involves a derogation from the rights of a person before allowing the section to operate, in order to validate the defective proceedings of the company. The criteria in exercising discretion is for the court to satisfy itself that any such order would not do injustice to the company or to any member or creditor thereof – section 355(3)(b).

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In *Holmes v. Life Funds of Australia Ltd.* [1971] 1 NSWLR 860 @ p. 865 Street J in evaluating the procedural justice or injustice in sub-section (3)(b) of the section held that when determining the procedural justice or injustice attending the exercise of the court's discretion under section 366 (Australian), regard is to be had to the likelihood of prejudice to any individual member by reason of the defect or omission which took place. Where a company's general meeting and election of directors was invalid for want of proper notice, the court ruled that section 366 was not apt to cure the defect – *Mansfield v. N.S.W. Leagues' Club Bowling Club Ltd.* [1963] 80 WN (NSW) 1407.

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3. The requisition of both the EGM being clearly requisition by only one member that is to say the 2nd defendant contravened s. 144(1) of the Companies Act which read as follows:

144 Convening of extraordinary general meeting on requisition

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- (1) The directors of a company, notwithstanding anything in its articles, shall on the requisition of members holding at the date of the deposit of the requisition not less than one-tenth of such of the paid-up capital as at the date of the deposit carries the right of voting at general meetings

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- A or, in the case of a company not having a share capital, of members representing not less than one-tenth of the total voting rights of all members having at that date a right to vote at general meetings, forthwith proceed duly to convene an extraordinary general meeting of the company to be held as soon as practicable but in any case not later than two months after the receipt by the
- B case not later than two months after the receipt by the company of the requisition.

C It is clear that by the words “requisition of members” the section was meant to apply only when more than one member’s requisition at the meeting. The requisition by a singular member, the 2nd defendant is therefore invalid.

4. By reason of the incurable irregularities of both the EGM, the plaintiffs are therefore entitled to the declaration that:

- D 2. The Invalid Directors and each and every one or more of them be restrained and an Injunction Order be granted restraining them whether by themselves or servants or their agents or otherwise howsoever from in any way or manner:-

E 2.1 presenting or representing themselves as a Director of the 1st Plaintiff;

2.2 performing all or any of the power, role and/or function of a Director of the 1st Plaintiff;

F 2.3 carrying out all or any of the duties or responsibilities of a Director of the 1st Plaintiff; and/or

2.4 participating or interfering in the running of the business, management and/or affairs of the 1st Plaintiff.

G **[4] The Application Is Opposed On The Following Grounds (Submission By Counsel For The Defendants)**

- H 1. Both the originating summons are defective as in the body of both the summons the plaintiffs did not state the grounds on which the prayers were required. See Court of Appeal decision in *Saraswathy Devi Nadchatiram v. Vijayalakshmi Devi Nadchatiram* [1998] 1 CLJ 1035 per NH Chan JCA at pp. 1041 & 1042:

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Order 7 r. 3 of the Rules of the High Court 1980 (“the RHC”) provides that every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

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The instant originating summons does not contain any details of the questions on which Vijayalakshmi is seeking the court’s determination or direction nor does it contain sufficient particulars so as to show what her cause of action is in respect of which she is asking relief or remedy. Merely asking the court for an injunction against Saraswathy and her firm from acting in the four remaining civil suits under the Legal Profession Act 1976 or under its Rules is not enough. The originating summons must show why she or her firm should not act in the proceedings. Since this is not shown, no cause of action is disclosed in the originating summons against Saraswathy. On this ground alone, the originating summons ought to have been dismissed.

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2. The plaintiffs have failed to raise the issue of non service or late service in their affidavit and should therefore be disallowed to raise this point. In the affidavit they have admitted being served with the notices for both the meetings and have not deemed it fit to make any issue on them. In fact in para 11 of the said supporting affidavit by which the deponent of the affidavit had alluded to the fact that the Board of Directors had convened a meeting of the 1st plaintiff and had resolved not to partake in the EGM after having received the notice and by this conduct must be deemed to have waived the requirement of s. 145 requiring 14 clear days notice. See exh. “CKC4” the letter issued by the Board of Directors.

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3. Under s. 144 of the Companies Act 1965 a single member can requisition the EGM although the section mentions the word “members”. See *South Norseman Gold Mines No Liability v. MacDonald* [1937] SASL 53 per Reed AJ at 57 referring to s. 133 of the Australian Companies Act 1934 which is in para material with our s. 144(1):

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To put it in another way – it is a condition which must exist before the members of the Company, or any of them, can get the whole of the members together, and consequently discharge business which perhaps the directors are not ready or willing to bring up for discussion. If that is the true view, then the

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- A real reason of sub-sec. 1 is to prevent one individual shareholder, holding perhaps a small number of shares, from setting in motion the machinery for getting a general meeting called; but once a number of shareholders, or even one shareholder, holding not less than one-tenth of the paid-up capital desires a meeting to be called, they can require the directors by requisition to call it.
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4. Then see *Canopee Investment Pte Ltd & Ors v. Landmarks Holdings Bhd & Ors* [1987] 1 LNS 141 which applied the *MacDonald* case per Shankar J:
- C Lenders can aggregate their votes in a case such as this to requisition a meeting: See *Dominion Mining NL v. Hull & Anor* [1971] 2 NSWLR 259 (refd). Once shareholders having the necessary voting power and number of shares have lodged the requisition, the sole condition for bringing into existence the duty of the directors to call the meeting is fulfilled, and the subsequent withdrawal of some of the requisitionists does not affect the rights of the others. See *South Norseman Gold Mines NL v. MacDonald* [1937] SASL 53 (refd). In this case therefore, I do not think the non-participation of the thirteenth and fourteenth defendants in this action affects the portion.
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5. Even assuming that the service of the notice of both EGM was irregular this can be cured under s. 355 of the Companies Act 1965. The 1st requisition was merely to add three directors and there was no prejudice to the plaintiffs. This can be distinguished from the line of cases cited by the plaintiffs where the failure to provide the requisite notice had led to prejudice and therefore cannot be condoned. In respect of the 2nd requisition to remove a director (of which the 2nd plaintiff was one) we concede that special notice is required under s. 153 of the Companies Act 1965 requiring 28 days notice to be given. However, there is a saving provision under s. 153 itself that is to say by the following passage:
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- H Where by this Act special notice is required of a resolution, the resolution shall not be effective unless notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved, and the company shall give its members notice of any such resolution at the same time and in the same manner as it gives notice of the meeting or, if that is not practicable, shall give them notice thereof, in any manner allowed by the articles,
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not less than fourteen days before the meeting, but if after notice of the intention to move such a resolution has been given to the company, a meeting is called for a date twenty-eight days or less after the notice has been given, the notice, although not given to the company within the time required by this section, shall be deemed to be properly given.

(Plaintiffs conceded there is no contravention of s. 153 which is different from s. 145.)

Since the 2nd plaintiff already had notice that he was going to be removed as per the notice of 11 June 2007 satisfying the requirement of s. 153, there was an implied notice which satisfied s. 145 of the EGM.

[5] Reply By Counsel For The Plaintiffs

1. The *Saraswathy* decision referred to by my learned friend was made before the amendment to the Rules of the High Court 1980 *vide* PU (A) 197/2002 which stipulates under the new O. 1A which requires the court to have regard to the justice of the particular case and not only to the technical non-compliance of the rules. Hence the submission that the originating summons filed by us did not contain the grounds upon which the prayers were required can be condoned under this new amendment. In any case a Form 6 originating summons need not contain such grounds as O. 7 r. 3(1) only requires either a statement of the questions on which the plaintiff seeks the determination of the court or the concise statement of the relief or remedy.
2. There was a clear breach of arts. 59, 93, 159 and 161(1)(a) of the Articles of Association and s. 145(2) of the Companies Act 1965. Both the EGM should be declared null and void and consequential relief be granted.

Findings And Decision

[6] Having heard the submission of the parties I would agree entirely with the submission of counsel for the plaintiff that there were irregularities in the process by which both the EGM were convened. They have been set out clearly in the arguments of the counsel for the plaintiff that is to say:

- A i. The service of the notice of both the EGM to appoint three new directors and to remove the managing director respectively were served two days short of the required 14 days pursuant to s. 145(2) taking into consideration the need to add two days to allow the service by post to be deemed served as per art. 159.
- B ii. The notices of both the EGM were not served on the three other directors that is to say the 4th, 5th and 6th plaintiffs as required under art. 93 read together with art. 161(1)(a).
- C iii. The notices of both the EGM were not advertised in the daily press as required under art. 59 of the Articles of Association although the shareholders had been served with the notices.
- D [7] It is trite law that any general meeting of a company which contravenes the provision with respect to the service of the notices to members and directors must comply with the procedural requirements under the Act and the Articles of Association. This is set out clearly in the case of *HLB Nominees (Tempatan) Sdn Bhd, supra*.
- E [8] The case of *Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 sets out clearly the serious consequence of failing to conduct a meeting in accordance with the provisions of the Companies Act 1965. That case dealt
- F with the right of the shareholders to attend, speak and vote at a general meeting under s. 148. The relevant passage per Edgar Joseph Jr. J (as he then was) read as follows:
- G ... not a mere procedural irregularity curable by the majority but an illegality since it was an abuse of power or oppression of the minority which vitiated and therefore rendered null and void the AGM and all resolutions passed thereat.
- H [9] The defendants' submission alluding to the requirements under s. 153 of the Act is clearly untenable. It is clear that the plaintiffs' complaint in this case is with regards to the non-compliance of the provision of s. 145 on the requisition of meetings by members and not the giving of notice by the company in respect of resolutions to the members under s. 153.
- I [10] Having scrutinized Form 6 (originating summons requiring appearance) myself, it is clear that the Form did not specifically require the plaintiffs to state therein the grounds for the prayers sought although the inclusion of such ground on the Form itself

would enhance its utility as it would provide the defendants with a comprehensive assessment of what the plaintiffs are seeking in the originating summons. The absence of the ground or lack of it should not prejudice the defendants in any case as the originating summons has been accompanied by the supporting affidavit of the plaintiffs.

[11] With respect to the plaintiffs' submission that the s. 144 of the Companies Act 1965 would apply only if more than one member made the requisition the issue has been well treaded. The decision in *South Norseman Gold Mines, supra* had been approved and followed here in our jurisdiction in *Canopee Investment Pte Ltd, supra*. The 2nd defendant was perfectly competent to requisition the EGM but it had failed to comply with the requirement of s. 145 of the Act and the Articles of Association of the company with respect to the service of the notice as described, the effect of which will render the meetings and the decision made thereunder void.

[12] There shall be an order in terms of the plaintiffs with costs.

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